agent of Zee for the receipt of the money. It would, if accepted, fit the defence within the definition of the law submitted by Mr. Shankar.

On the question of their genuineness, Ho denied having previously received the letter addressed to him and having seen the letter to the accused. Ho also denied the accused's allegation that they were written at his (Ho's) suggestion for "an authorisation for payment of money". Ho also thought that the signature was not Zee's usual signature. The accused who produced these letters at his trial did not explain how he had come to retain them when at least one of them was addressed to Ho or why he had referred only to the letter to him without referring to the letter to Ho which was on the face of it enclosed with it. He ventured the evidence that "when I found the letter on my table and read it, I felt 'funny'." This was a queer reaction to a completely reasonable request for repayment of a debt alleged and there was no reason to feel "funny" whatever he meant by it or to send for Zee as if to reproach him for it or to question him on it.

On the question of the purport of the letter to the accused, it was tendered by the defence as evidence of the debt and the demand for repayment, but, strangely, not as authorisation to keep the money. The accused would appear to have completely misread the letter for its full effect. On the other hand, this letter was of course at variance with at least two of Zee's letters, those of May 17, 1974 wherein Zee promised to forward the details and vouchers for the claim.

Even on the strength of these latter letters and the allegation that the accused had retained the money from June 24 to July 24, 1974, the accused had committed criminal misappropriation of the money. To refine the case of the clerk who dips his hands into the firm's till somewhat, if he is in possession of the firm's money with a duty to bank it or to pay it over to a particular person in discharge of the firm's debt to this person and he only does so after using it for his own purpose for however short a period of time, he is guilty of misappropriation.

But the learned judge had found that the accused had not to the date of the trial paid the money over to Zee or Hwa Chiang. There had been no withdrawal of this amount from Li Seng Min. Neither had the accused indicated any remittance to Zee from any of his other sources. We are not prepared to differ from the learned judge's finding. The accused had, indeed, not cast any doubt on the truth of the prosecution evidence.

Accordingly, we dismiss the appeal against conviction.

Appeal dismissed.

Solicitors: *Sri Ram, Chan & Chia.*

ONG KIM KHOON v. GAYA FILEM BHD.

[F.C. (Raja Azlan Shah, Wan Suleiman and Chang Min Tat F.JJ.) May 29, 30 and September 28, 1978]
[Kuala Lumpur — Federal Court Civil Appeal No. 177 of 1977]

Land Law — Conveyancing — Completion of sale — Letter confirming approval of loan to purchaser — Whether sufficient tender of purchase price.

In this case the respondent had agreed to purchase land from the appellant for the purchase price of $230,000, of which the usual 10% or $23,000 was paid on the execution of the contract. It was agreed that the balance of $207,000 was to be paid to the stakeholders "not earlier" than three months from the date of the agreement which was August 19, 1974 or upon obtaining vacant possession, whichever should be later. Vacant possession of the property was handed over to the respondent on November 10, 1974. Completion should therefore have been on February 10, 1975 but by that date the balance of the purchase price had not been paid. The respondent complained of defects to the house on the land and the repairs were undertaken by the appellants. On December 17, 1974 the respondents had paid a further sum of $20,000 to account of the purchase price and on February 25, 1975 the respondents sent a letter to the appellants alleging an agreement to defer the completion date to March 10, 1975 "at the latest" which the appellant endorsed. On March 10, 1975, the solicitors for the appellant received a letter from the solicitors of a finance company to whom the respondent had applied for a loan in order to complete the purchase, confirming the approval of a loan of $160,000. On the same day the respondents paid to the same solicitors, who were named in the contract as the stakeholders, the sum of $27,000 in cash. On March 19, 1975 the appellant wrote to the effect that if the respondent failed to complete the sale on or before March 25, 1975 he would terminate the sale and forfeit the deposit and on April 17, 1975 he wrote to the respondent terminating the sale. The respondent thereupon brought an action to seek specific performance of the contract of sale of the land and the High Court ordered specific performance as the learned Judge held that the respondent had complied with the obligation to pay the balance of the purchase price. He held that the advice of the approval of the loan of $160,000 and the payment in of $27,000 constituted full compliance with the respondent's obligation to complete the purchase. The appellant appealed.

Held, allowing the appeal: on a proper construction, the respondent must be held to have contracted to pay the balance of the purchase money to the stakeholders in cash. There was no evidence in this case that the appellants had agreed to a variation in the form of tender and the learned trial judge was therefore wrong in holding that merely accepting a copy of the letter of March 10, 1975 from the lenders to the solicitors for the appellants was acceptance of the mode of payment and sufficient tender.

Cases referred to:-

(1) *Finch* v. *Brook* (1834) 1 Bing. N.C. 252.
(2) *Re Farley, ex parte Danks* (1852) 2 De G.M. & G. 936.
(3) *Farquharson* v. *Peare Assurance Co.* [1973] 3 All E.R. 124.
(4) *Jennings* v. *Zihari-Kiss* [1972] 2 S.A.S.R. 493.
(5) *Re Roper* [1959] 2 All E.R. 605.
(6) *Beeves & Anor.* v. *Mason,* Times, July 19, 1978.
(7) *Chintamanie Ajit* v. *Joseph Mootoo Sammy* [1966] 3 W.L.R. 983.

FEDERAL COURT.

J.G. Bernatt for the appellant.

V.K. Palansuntharam (*S. Kulasegaran* with him) for the respondent.

Raja Azlan Shah F.J.: I have had the advantage of reading in draft the judgment of my learned brother Chang Min Tat F.J. I agree with it and with his conclusion that the appeal and counter-claim be allowed.

I would only add a word about tender. In order to constitute a valid tender of money there must be an actual production of the money, or a dispensation of such production. Whether there is a dispensation, actual or implied, is a question of fact. That proposition is to be found in the case of *Finch* v. *Brook*[1] where Tindal C.J. had this to say (pages 256, 257):

"All the cases agree that, in order to constitute a sufficient tender, there must be an actual production of the money, or a dispensation of such production. Here, there was no actual production. Was there any actual or implied dispensation? Upon that point the jury are silent; and the case is before us on the finding of the jury only. Now, the jury, if they were satisfied that there had been impliedly a dispensation, might have found generally for the defendant."

In *Re Farley, Ex p. Danks*[2] the same question was discussed by the court in a bankruptcy appeal, and at page 941, Knight Bruce L.J., in dealing with this question, said:

"Then comes the question, whether Mr. Farley, when in the office, either produced and showed the money to Mr. Danks, or, after addressing him on the subject, shook the money or part of it in a bag or pocket, so that Mr. Danks heard money (to use a phrase used in the evidence) 'jingle.' That, if both these things were not, one or the other of them was done, is, to my mind, perfectly clear. This last question may or may not be essential or material; but that which I now come seems certainly so, — the question, namely, whether Mr. Farley did in the office state to Mr. Danks, distinctly and so as to be heard and understood by him, thus, in effect and substance: That Mr. Farley had brought with him, and then had there, £85 11s. 10d. for the purpose of paying to Mr. Danks, and offered then and there to pay him that sum, being the amount admitted to be due to him from Mr. Farley. The question is not, I say, whether these very words were used, but whether Mr. Farley expressed himself in that sense, and so as to be understood in that sense by Mr. Danks; and it is my opinion morally, as well as my conclusion judicially, upon all the materials before the court, that this question ought to be answered in the affirmative."

He said later, at page 942:

"He does not appear to have taken any objection to the invisibility of the money, if it was invisible. He says in effect that he told Mr. Farley that he would not receive it, for that is the substance of what Mr. Danks has stated to the court. Whether he did or did not refer Mr. Farley to his attorney is, I conceive, upon this point of tender, not at all material."

Lord Cranworth L.J., said, at page 945:

"Now, in order to make a tender, I assume that the person pleading the tender must either have actually produced the money, or have been ready and able to produce it, and only be prevented from producing it by the other party dispensing with his so doing. And in my opinion, for the reasons which have been very fully pointed out by my learned brother, it is clear to demonstration that Mr. Farley had the money, the exact sum; that he had it there for the purpose of tendering it; that he came instructed by his solicitor as to the mode in which he was to make that tender, and that he did make that tender; make the offer to produce it, even supposing the money was never out of his pocket."

Those two cases are discussed in *Farquharson* v. *Pearl Assurance Co.*[3] which is an unusual case concerning tender of insurance premium. Singleton J. in giving judgment adopted the "ready and willing to pay" test unless there was, either expressly or impliedly, dispensation with the production.

The present case has been fully considered by Chang Min Tat F.J. in his judgment. Briefly, I agree with him that there are circumstances which establish that payment in cash was required of the purchaser, and that they negate any suggestion of a dispensation with actual production of the money.

Chang Min Tat F.J.: The decision of the High Court to order specific performance of a contract to sell land was particularly grounded on the finding that the purchasers had complied with the obligation to pay the balance of the purchase price. The whole purchase price was $230,000, of which the usual 10% or $23,000 was paid on the execution of the agreement. A further sum of $20,000 was paid, inferentially for an extension of the time for completion by the purchasers. There remained to be paid a sum of $187,000 by the purchasers to comply with their obligation. On the day fixed or adjusted for completion said to be March 10, 1975, the solicitors for the purchasers received a letter from the solicitors of the Central Finance Berhad, to whom the purchasers had applied for a loan in order to complete the purchase, confirming the approval of a loan of $160,000. On the same day, the purchasers paid to the same solicitors who were named in the contract as the stakeholders, the other $27,000 in cash. The learned trial judge held that the advice of the approval of a loan of $160,000 and the payment in $27,000 constituted full compliance with the purchasers' obligation to complete the purchase.

The contract itself was unexceptionable. It recited the ownership of the land and an existing charge thereof to the Overseas Union Bank Ltd., and that the vendor was presently negotiating to transfer the charge to the Hongkong and Shanghai Banking Corporation to secure overdraft facilities of up to $150,000. The sale was for $230,000 and the land was to be sold free from encumbrances. The balance of $207,000 was to be paid to the stakeholders "not earlier" than three months from the date of the agreement, which was August 19, 1974, or upon obtaining vacant possession, whichever should be the later. Upon such payment and notification thereof, he, the vendor, was immediately to sign a valid and registrable transfer of the land and also simultaneously to make arrangements for the discharge of the charge.

The provision for stakeholders is necessary in the Torrens system of conveyancing, under which title does not pass upon execution of the transfer but only upon due registration of the same.

The only other important clause was a provision for time to be of the essence.

The trial took an unusual turn. After one witness, the Managing Director of the purchasing firm, had given evidence, the trial court was advised that both parties did not wish to call further evidence. Liberty was reserved to the parties to refer to the documents put in. The meaning of this ploy is obscure. It is not certain whether the agreement reached was to treat this case as a matter of the construction of the agreement and the inferences to be drawn from the correspondence. What is clear is only that the dispute between the parties was whether the purchasers had completed the purchase.

This issue, simple to state, was, however, clouded by the undisguised but nonetheless regrettable fact that not only was the solicitor the same solicitor for the purchasers and the vendor (indeed he acted at all relevant times for both parties until past the period fixed

for completion), but he was also a director of the purchaser-firm. But while having to mention this fact for the proper understanding of this case and perhaps also while having to discuss its effect on the subsequent negotiations between the parties, it is fortunately possible to decide the issue in this appeal without having to consider whether the vendor had the full benefit of proper and independent legal advice and the effect on the case in hand or without having to refer to a fairly large number of cases which dilate on the undesirability and indeed the dangers of such a course. But perhaps, the following view of Bray C.J. in *Jennings* v. *Zihari-Kiss*[4] may not be out-of-place:

"The undesirability of this (the same solicitor acting for both vendor and purchaser) has often been pointed out by courts and, in my view, it is not only undesirable but wrong, whether the adviser in question is a solicitor or a land agent. It is impossible for the same person to give satisfactory service as the confidential and expert adviser of both parties with conflicting interests. The man who undertakes to serve two masters may easily find himself in the position where he must be false to one and possibly to both. . . ."

On November 10, 1974, the vendor advised the purchasers that vacant possession of the premises had been obtained and the keys to the premises were handed over to them. If the contract is construed as it stands, completion should therefore be on February 10, 1974 but by this day, neither the balance of the purchase money nor any part thereof was paid to the stakeholders and it was clear from the subsequent conduct that the simple reason was that the purchasers did not have the means to do so. They had to resort to a loan from a bank or a lending house in order to complete the purchase. And it transpired that the security they proposed to put up for such a loan was the house they proposed to buy. But this fact was never made known at any time to the vendor.

What the purchasers did was to employ, what I think may be properly called, a stratagem to defer the completion. Having collected the keys, they complained of certain damages to the house and demanded repairs of these defects. This demand was made in a letter dated January 19, 1975 to the same solicitors, who thereupon forwarded a copy to the vendor for necessary action, i.e. for the defects to be repaired, without however indicating in any way whatsoever whether the sale "free from all encumbrances" meant a sale of a house in good repair. In the events that happened, the vendor repaired the house, almost certainly at his own expense; the purchasers paid on December 17, 1974 a further $20,000 to account of the purchase price, and on February 25, 1975, the purchasers presented him with a letter alleging an agreement to defer the completion date to March 10, 1975 "at the latest", which the vendor endorsed.

As for the notification to him of the approval of the loan on March 10, 1975, nothing turned on whether or not he did receive it or on the letter of the same date from the solicitors to the chargee-bank for release of the documents of title. But clearly the appellant did not accept the approval of the loan as the tender of the balance of the purchase price, as on March 19, 1975, he himself wrote, without benefit of legal advice, to the effect that if the purchasers failed to complete the sale on or before March 25, 1975, he would terminate the sale and forfeit the deposit. Finally, on April 17, 1975, he wrote to the respondent with a carbon copy to a firm of solicitors who subsequently acted for him, terminating the sale. In this letter, he made a mistake and referred to March 10, 1975 as the completion date. But again nothing turned on the actual date of completion. Neither on March 10, nor on March 25 nor at any time up to April 17, 1975 was any part of the sum of $160,000 paid in to the stakeholders.

In coming to his decision, the learned trial judge construed the clause in the contract as imputing the knowledge of the vendor that the purchasers required a loan to finance their purchase. With respect, I do not agree. There is nothing in the contract or in any subsequent correspondence until the letter of March 10, 1975 to indicate that the vendor knew or was apprised of this requirement; neither do I think that in the circumstances it would be correct or equitable to impute the knowledge of his solicitor to him.

But having come to this conclusion, the learned trial judge then went into the "common manner" of carrying into effect purchases of property subject to a charge. His analysis is in these words:

"First the discharge of the property from a bank or finance company to which the vendor had earlier borrowed money on the security of the property, then transferring into the name of the purchaser who will simultaneously at the time of the execution of the acceptance of transfer, execute a charge of the property to his own bank or finance company for a loan in order to purchase the property. This work is sometimes carried out by a single solicitor or a single firm of solicitors and sometimes the parties will engage separate solicitors. In this case they engaged the same solicitors."

The fact that the same solicitor acted for the parties had not therefore escaped the notice of the trial judge. He then concluded the paragraph thus:

"In the light of the case of *Re Roper*[5] alone, it would appear to me the transaction between the plaintiffs and the defendant was a *bona fide* one and the letter notifying the availability of the loan should therefore be treated as proper tender."

There is no quarrel with the first finding of the genuineness of the sale. The vendor had agreed to sell and had bound himself contractually so to do. The purchasers had also contracted to buy and if they had completed the purchase, they could have compelled the vendor to perform specifically his agreement to sell. The second proposition is a complete non-sequitur and in the absence of agreement, not true. The question is whether the purchasers had made a proper tender. With respect, I do not think that they had.

Re Roper, supra, was a case where the sum of £2,000 agreed to be paid was paid partly in cash and partly by a bill of sale. In my view, what this case really decided was that there had been a tender in a manner which was accepted by the other side. It is no authority for any proposition that in the circumstances of this or similar case, the tender by notification of a loan is a proper and valid tender, where it is not accepted by the vendor.

The learned judge however thought that the conduct of the defendant as adduced in the correspondence implied his acceptance of the purported tender. With respect, such an inference could not be drawn

from the correspondence. Neither do I consider, with respect, that he was right in his finding that there was no evidence the vendor protested against such a method of payment. For myself I read the letters of February 26 and March 19 as requiring payment in cash, as stipulated in the agreement.

In my respectful view, the question is to be decided as a matter of construction. And on a proper construction, the purchasers must be held to have contracted to pay the balance of the purchase money to the stakeholders in cash. The purchasers knew from the terms of the contract that the vendor required the purchase money to effect the discharge of the charge on the property and to deduce a good title. It was of some considerable importance to the vendor that he should have the money; a mere promise of money was not sufficient for his purpose.

In the matter of tender, as was said in *Beeves & Anor.* v. *Mason*[6] (reported in the London *Times* of July 19, 1978), a case on the tender of rents, on general principles, the landlord (or in a sale, the vendor) should have the rent (or the purchase money) in cash in his hands by the due date. That requirement might, however, be waived by express arrangements or by necessary implication, where the facts were sufficiently strong to establish that the landlord had shown that he was content to accept payment by cheque posted by the due date of payment. Inferences of that nature were not to be too readily drawn, but where the facts supported them clearly and emphatically they were not to be dismissed. But in the absence of such arrangement or of evidence from which an inference to this effect can be drawn, the form of tender must be as agreed in the contract.

I regret therefore being unable to agree with the learned judge that merely accepting the copy of the letter of March 10, 1975 from the lenders to the purchasers was acceptance of the mode of payment and sufficient tender, in the absence of any evidence that the contents of the letter were explained to him and he had agreed. Further, apart from the fact that his then solicitor had at no time sufficiently or properly advised him, the vendor, that without his agreement, there was no tender as such, this finding did not take into consideration the vendor's letter of March 19. This letter in my view sufficiently disproved any suggestion that the vendor had consented to a variation in the mode of tender. The conclusion also failed to consider that the letter of March 10 was inferentially only an approval of an application for loan, subject to a good title being deduced. If a cheque is not a good tender with its definite instructions to the banker to pay on presentation, *a fortiori*, a conditional approval of a loan would have less effect to discharge the purchasers' obligation.

It has not been argued that time was not of the essence, but if there is such an argument, the letter of March 19 making March 25 the final date for completion, in my view, was sufficient to require the purchasers to tender the balance of the purchase money by this date upon penalty of being found in breach of their obligation to complete: *Chintamanie Ajit* v. *Joseph Mootoo Sammy.*[7]

I would therefore allow the appeal. The claim of the purchasers (plaintiffs) stands dismissed with costs here and in the court below. The counterclaim is allowed also with costs in the agreed sum of $8,000.

Wan Suleiman F.J. concurred.

Appeal and counter-claim allowed.

Solicitors: *Baharuddin, Bernatt, Tan & Ker; Ranjit, Thomas & Kula.*

TUCK SENG LOONG TRANSPORT CO. SDN. BHD. v. LATCHAMAN SINGH

[F.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman and Chang Min Tat F.JJ.) March 21 and September 30, 1978]
[Kuala Lumpur — Federal Court Civil Appeal No. 89 of 1977]

Torts — Damages — Loss of future earnings — Loss of earning capacity — Interference by appeal court.

In this case the learned trial judge had awarded $16,000 to the respondent for loss of future earnings arising from injuries sustained by him in a road accident. The appellant appealed on the ground that what the learned trial judge held to be "loss of future earnings" should really be "loss of earning capacity."

Held, dismissing the appeal: (1) it was plain in this case that the learned trial judge had found that there was satisfactory evidence of future loss of earnings;

(2) in this case the appellate court had no reason to interfere with the award of damages made by the trial judge.

Cases referred to:-

(1) *Rasidin bin Partorjo* v. *Frederick Kiai* [1976] 2 M.L.J. 214.

(2) *Davies & Another* v. *Powell Duffryn Associated Collieries Ltd.* [1942] A.C. 601, 616, 617.

FEDERAL COURT.

N.A. Marjoribanks for the appellant.

Butuk Morris Edgar for the respondent.

Cur. Adv. Vult.

Wan Suleiman F.J.: The appellants were the respondents in the court below.

The appeal is against that portion of the learned judge's decision which relates to loss of future earnings, for which the award was $16,000.

Respondent was a lorry driver at the time when he was involved in an accident with the defendants' lorry on February 2, 1972. It is not disputed that he suffered severe injuries in the accident and had his right arm amputated. I need not set out the other injuries which are irrelevant for the purposes of this appeal except for the one to his right leg. Both these injuries left him with a certain degree of residual or permanent disability.

Respondent had been a lorry driver for about 20 years and said he was no longer able to drive a motor lorry and was not able to obtain employment even as a watchman as a consequence of his injuries. At the date of hearing he was between 40 and 41 years old. He said that he was earning $250 as a lorry driver. Since the accident he had purchased cattle with financial help from relatives but he was only able